No. 06-856

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES LaRUE, PETITIONER

v.

DeWOLFF, BOBERG & ASSOCIATES, INC.; AND DeWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether section 502(a)(2) of the Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(2), authorizes a participant in a defined contribution pension plan to sue to recover losses to the plan caused by a fiduciary breach when the losses are attributable to the participant's individual plan account.

2. Whether an action by a plan participant against a fiduciary to recover losses caused by a fiduciary breach seeks "equitable relief" within the meaning of ERISA section 502(a)(3), 29 U.S.C. 1132(a)(3).

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The original opinion of the Fourth Circuit (Pet. App. 1a-14a) is published at 450 F.3d 570. The order and opinion of the district court granting respondents' motion for judgment on the pleadings (Pet. App. 15a-21a) and the order of judgment dismissing petitioner's complaint (Pet. App. 30a-31a) are unpublished. The order denying a timely petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 22a-29a) is published at 458 F.3d 359.

JURISDICTION

The Fourth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc* on August 8, 2006. The petition for a writ of certiorari was filed on November 6, 2006, and granted on June 18, 2007. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, Tit. I, 88 Stat. 829 (29 U.S.C. 1001 *et seq.*), are set forth in the appendix to this brief.

INTRODUCTION

Like tens of millions of Americans, petitioner James LaRue attempted to save for his retirement by contributing money to what is commonly referred to as a 401(k) plan. This 401(k) plan was sponsored, and is maintained, by petitioner's former employer, respondent DeWolff, Boberg & Associates, Inc. ("DeWolff"). The plan itself, also a respondent here, is known as the DeWolff, Boberg & Associates Employees' Savings Plan (the "DeWolff Plan"), and is governed by ERISA. BIO App. 9a, 12a.

On June 2, 2004, petitioner filed a lawsuit against respondents. In this lawsuit, petitioner alleged that his 401(k) account balance in the DeWolff Plan had been depleted by approximately $150,000 as the result of respondents' misconduct. *Id.* at 2a-4a. Petitioner's principal allegation was that respondents breached their fiduciary duties under ERISA by ignoring his investment instructions. *Id.* at 3a-4a ("On at least two occasions, the Plaintiff directed the plan * * * to invest his money and contributions a certain way, but the plan and its administrator, DeWolff, failed to invest Plaintiff's money as directed."). As a remedy, petitioner requested that the court order respondents "to reimburse to the plan amounts necessary so that [his] interest in the plan is what it should have been, but for [respondents' misconduct]." *Id.* at 50a.

Although this lawsuit has been pending for over three years, no court has ever addressed whether respondents did, in fact, violate ERISA. This is because respondents persuaded the district court and the court of appeals that ERISA does not subject the fiduciary of a 401(k) plan to any monetary liability for account losses suffered by an *individ-*

ual 401(k) account holder whose investment instructions were ignored. See generally Pet. App. 1a-14a, 15a-21a, 22a-29a. As both petitioner and the United States argued in the court of appeals, the lower court's judgment is based on a fundamental misinterpretation of both section 502(a)(2) (29 U.S.C. 1132(a)(2)) and section 502(a)(3) (29 U.S.C. 1132(a)(3)) of ERISA. This erroneous interpretation of two of the statute's most important remedial provisions will diminish the retirement security of tens of millions of American workers and retirees.

In an effort to articulate petitioner's legal position clearly and in its proper context, this brief first provides some necessary background regarding ERISA. It then recounts the procedural history of this case.

STATEMENT

A. Statutory Background

After many years of study and debate, Congress enacted ERISA in 1974. "ERISA was Congress's attempt to devise a comprehensive regulatory program to protect millions of American workers who looked to private pension plans for financial support in their retirement years." James A. Wooten, *The Employee Retirement Income Security Act of 1974, a Political History* 1 (2004). In the words of Congress, "the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial [and] the continued well-being and security of millions of employees and their dependents are directly affected by these plans." 29 U.S.C. 1001(a).[1]

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[1] ERISA regulates both pension and welfare plans. 29 U.S.C. 1002(3). A "pension plan" is defined to include "any plan, fund, or program * * * established or maintained by an employer" that "(i) provides retirement income" or "(ii) results in a deferral of income by employees." 29 U.S.C. 1002(2)(A). A "welfare plan" is defined to include "any plan, fund, or program * * * established or maintained by an employer" that "provid[es] medical, surgical or hospital care or benefits, or benefits in the

The importance of ERISA today can hardly be overstated. Other than Social Security, "employer-sponsored retirement plans are the single largest source of income for aged Americans." Wooten, *supra*, at 1-2 (citations omitted). "About fifty million private-sector employees, including a majority of year-round, full-time workers, participate in a retirement plan regulated by ERISA." *Id.* at 2 (citations omitted). As of the end of 2006, these retirement plans held more than $5.5 trillion in assets. Board of Governors of the Fed. Reserve Sys., *Flow of Fund Accounts of the United States: Flows and Outstandings, First Quarter 2007,* Statistical Release Z.1, at 113 (June 7, 2007) <http://www.federalreserve.gov/releaes/Z1/Current/z1.pdf> (hereinafter, "Fed. Reserve Statistical Release").

1. The two types of pension plans under ERISA

ERISA groups every pension plan into one of two categories: "defined benefit" (29 U.S.C. 1002(35)) or "defined contribution" (29 U.S.C. 1002(34)). See also U.S. Dep't of Labor Website, *Find It! By Topic, Retirement Plans, Benefits & Savings: Types of Retirement Plans* <www.dol.gov/dol/topic/retirement/typesofplans.htm> (explaining the difference between a defined benefit plan and a defined contribution plan) (hereinafter, "DOL Website").

A defined benefit plan promises to pay a fixed retirement benefit, usually monthly, for the life of the participant and his or her spouse. The amount of such a benefit is typi-

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event of sickness, accident, disability, death or unemployment." 29 U.S.C. 1002(1). Other than Medicare, most health insurance in the United States is provided through ERISA-governed welfare plans. See Loraine Schmall & Brendan Stephens, *ERISA Preemption: A Move Towards Defederalizing Claims for Patients' Rights,* 42 Brandeis L.J. 529, 538 (2004); John H. Langbein & Bruce A. Wolk, *Pension & Employee Benefit Law* 892 (3d ed. 2000) (noting that, in the United States, "most health care for the nonelderly is delivered through ERISA-covered employee benefit plans"). Although this case involves a pension plan and not a welfare plan, resolution of the questions presented will likely have a significant impact on both pension *and* welfare plans.

cally determined pursuant to a formula that takes into account the participant's years of service and compensation. See Emp. Benefit Res. Inst., *Fundamentals of Employee Benefit Programs* 56 (5th ed. 1997). Conversely, a defined contribution plan does *not* promise a specific amount of benefits at retirement. Instead, an employee who participates in a defined contribution plan is assigned an individual account within the plan to which money is contributed by the employee and/or his employer.[2] The employee is the beneficial owner of the funds allocated to his or her individual account within the plan.[3] Among the different types of defined contribution plans are 401(k) plans like the one involved in this case. See DOL Website, *supra* (explaining that "defined contribution plans include 401(k) plans, 403(b) plans, employee stock ownership plans, and profit-sharing plans"). See also BIO App. 12a (noting that the DeWolff "Plan is a type of qualified retirement plan commonly referred to as a 401(k) plan").

2. The concept of "administration risk"

In every pension plan—regardless whether it is of the defined benefit or defined contribution variety—there exists what is often called "administration risk." Put simply, administration risk is "the danger that the persons responsible for managing and investing plan assets and paying claims may abuse their authority." See John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 Colum. L. Rev. 1317, 1323 (2002). It includes the risk that "[t]hey may do their job badly, or misuse plan assets for personal gain, or

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[2] This is why section 3(34) of ERISA uses the term "defined contribution plan" and "individual account plan" interchangeably. 29 U.S.C. 1102(34).

[3] At any given time, this balance is equal to the total amount of past contributions adjusted to reflect the account's share of three things: (1) any income or expenses, (2) any gains or losses, and (3) any forfeitures of other participants' accounts. 29 U.S.C. 1102(34).

improperly refuse to pay promised benefits." *Id.* (footnotes omitted).[4]

As this Court has repeatedly recognized, protecting workers and retirees against administration risk was the primary objective of Congress in enacting ERISA. See, *e.g.*, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) ("[T]he crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and * * * ERISA was designed to prevent these abuses in the future."); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) ("In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.") (citation and footnote omitted).[5]

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[4] Administration risk is not unique to pension plans. See Langbein, *supra*, at 1323. ("[T]he assets in a nonpension [*i.e.*, welfare] plan [may be] exposed to [the same] abuse as those of a pension fund."). As such, "Congress determined to bring [these] nonpension plans under ERISA's coverage" so that it could "subject them to ERISA fiduciary law." *Id.*

[5] Another main purpose of Congress in enacting ERISA was the elimination of a particular hazard largely unique to defined benefit plans known as "default risk." Any defined benefit plan necessarily presents a risk of default "because the plan promises today's worker to pay benefits far in the future." Langbein, *supra*, at 1323. Thus, before benefits are actually paid, "the plan can become insolvent, or it can renege in other ways on the pension promise." *Id.* Default risk was a substantial concern in 1974 because the pension system at that time was dominated by defined benefit plans. Wooten, *supra*, at 278 ("[A]s late as 1979, more than 80 percent of individuals who participated in a private retirement plan were in a defined-benefit plan," and such plans "held assets valued at roughly two and one-half times the value of assets held by * * * defined-contribution plans.") (citations omitted). Today, default risk has all but been eliminated because of ERISA. See Langbein, *supra*, at 1323. For example, "[a]ll defined benefit plans must pay a premium per covered participant into a fund administered by an ERISA-created government agency * * * which guarantees the payment of most benefits promised under defined benefit plans." *Id.* (footnote and citations omitted).

3. The use of fiduciary duties and civil remedies in ERISA to combat administration risk

In drafting ERISA, Congress chose to protect against administration risk by adopting a modified version of preexisting trust law. Langbein, *supra*, at 1324 ("[W]hen confronting abuse in plan administration, Congress was able to adapt the long-familiar trust model as the regulatory regime."). See also *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (noting that the duties imposed by ERISA on plan fiduciaries "draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment") (citations omitted); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989).

The statute requires that virtually every employee benefit plan be structured as a trust. See 29 U.S.C. 1103(a). See also 26 U.S.C. 401(a) (2000 & Supp. IV 2004) (describing circumstances under which a "pension * * * shall constitute a qualified trust"). Section 403 of ERISA mandates that "all assets of an employee benefit plan shall be held in trust by one or more trustees [who, subject to limited exceptions] shall have exclusive authority and discretion to manage and control the assets of the plan." 29 U.S.C. 1003(a). Under this section, "the assets of a plan [subject to limited exceptions] shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. 1003(c)(1). Moreover, the statute groups those who oversee an ERISA trust under the rubric of "fiduciary" and provides an extremely broad definition of this term. See 29 U.S.C. 1002(21) (defining "fiduciary"). The breadth of this definition is quite significant because ERISA imposes many strict obligations on fiduciaries that, if violated, may give rise to personal liability.

a. The fiduciary duties imposed by ERISA

The primary fiduciary duties under the statute are derived from the common law of trusts. Section 404(a)(1)(A) codifies the common law trust principle of a duty of loyalty.

This provision states that "a fiduciary shall discharge his duties with respect to a plan * * * for the exclusive purpose of * * * providing benefits to participants and their beneficiaries [and] defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A). Section 404(a)(1)(B) of ERISA codifies the common law trust principle of a duty of care. This provision states that "a fiduciary shall discharge his duties with respect to a plan * * * with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. 1104(a)(1)(B).

In addition to codifying these common law fiduciary duties in general terms, section 404 of ERISA also provides some specific examples of these duties in the plan management context. For example, section 404(a)(1)(C) specifically provides that a plan fiduciary must "diversify[] the investment of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. 1104(a)(1)(C). And section 404(a)(1)(D) specifically provides that a plan fiduciary must act "in accordance with the documents and instruments governing the plan" unless such documents are inconsistent with ERISA. 29 U.S.C. 1104(a)(1)(D).

b. Civil remedies for fiduciary breach

If a fiduciary breaches his duties under ERISA, he is subject to liability under section 409 of the statute. This section, entitled "Liability for breach of fiduciary duty," provides,

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made

> through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. 1109(a). The liability of a fiduciary described in section 409 must be enforced, however, through a civil action brought pursuant to section 502(a) of ERISA, entitled "Civil enforcement."[6]

Section 502(a)(2) is the primary provision designed to authorize litigation against a fiduciary to remedy a breach of fiduciary duty. It states that "[a] civil action may be brought * * * by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title. [*i.e.*, section 409 of ERISA]." 29 U.S.C. 1132(a)(2).

Section 502(a)(3) is the second provision in ERISA that authorizes litigation against a fiduciary to remedy a breach of duty. It provides that "[a] civil action may be brought * * * by a participant, beneficiary, or fiduciary * * * to enjoin

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[6] Judicial interpretation of section 502(a) is an extraordinarily important task. Section 502(a) sets forth the exclusive civil remedies that are available under the statute. See, *e.g., Russell,* 473 U.S. at 146; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). This fact, coupled with an extremely strong ERISA preemption doctrine, means that even an *uncontested* violation of ERISA will be tolerated unless section 502(a) provides a remedy. The following examples are illustrative:

In the pension plan context, see, *e.g., Farr v. U.S. West Commc'ns, Inc.* 151 F.3d 908 (CA9 1998) (acknowledging that plan fiduciaries violated their duties under ERISA by *knowingly* withholding information regarding material tax consequences but finding that the participants had no remedy because the amount of additional taxes incurred were legal damages and, thus, unavailable under any part of section 502(a)).

In the welfare plan context, see, *e.g., Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (CA5 1992) (dismissing lawsuit for wrongful death of unborn child even though employer denied hospitalization for woman who, according to both her personal physician and independent physician consulted by employer, required complete bedrest and around-the-clock monitoring, where fetus died while woman was at home without medical care).

any act or practice which violates any provision of this subchapter or the terms of the plan. 29 U.S.C. 1132(a)(3). It also permits such plaintiffs to seek "other appropriate equitable relief * * * to redress such violations or * * * to enforce any provisions of this subchapter or the terms of the plan." *Id.* As this Court has observed, section 502(a)(3) "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [section] 502 does not elsewhere adequately remedy.'" *Varity Corp. v. Howe,* 516 U.S. 489, 512 (1996). Unlike section 502(a)(2), which only permits recovery by an ERISA *plan* that is harmed by fiduciary misconduct, section 502(a)(3) authorizes both plan relief *and* individual relief to remedy fiduciary breach provided that the remedy sought qualifies as "equitable."[7]

As explained below, this case presents two important questions of statutory interpretation regarding the scope of sections 502(a)(2) and 502(a)(3) of ERISA.

B. Proceedings Below

On June 2, 2004, petitioner filed a civil action against respondents. Pet. App. 15a. In his complaint, petitioner alleged (1) that he is a participant in the DeWolff Plan,[8] (2) that respondent DeWolff committed fiduciary breach in violation of ERISA by failing to invest petitioner's interest in the plan as directed, and (3) that this fiduciary breach caused

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[7] Until 1996, there was a split among the circuits regarding the proper role of section 502(a)(3) in the context of claims of fiduciary breach. In *Varity,* this Court resolved the split by holding that a remedy for injuries caused by a breaching fiduciary may be obtained under section 502(a)(3) by an injured ERISA plan *as well as* by an injured participant or beneficiary. 516 U.S. at 509.

[8] Respondents recently filed a motion to dismiss the writ arguing that petitioner is no longer a "participant" in the DeWolff Plan. As explained in petitioner's opposition to that motion, respondents' claim is baseless and, in any event, is not properly before this Court. *Amici,* including most notably, the United States, agree with petitioner on this point. See U.S. Merits Br. in Supp. of Pet. as *Amicus Curiae* 29 n.6; see also Law. Prof. Merits. Br. in Supp. of Pet. as *Amici Curiae,* pt. II.

petitioner's interest in the DeWolff Plan to be diminished by approximately $150,000. BIO App. 2a-4a. To redress this fiduciary breach, petitioner sought "'make whole' or other equitable relief as allowed by [section 502(a)(3) of ERISA]," as well as "such other and further relief as the court deems just and proper." *Id.* at 4a.

On February 2, 2005, respondents filed a motion for judgment on the pleadings claiming that the relief sought by petitioner for the alleged breach of fiduciary duty was not available under section 502(a) of ERISA. Pet. App. 16a. In opposing this motion, petitioner made clear precisely what remedy he sought. His opposition stated,

> Plaintiff does not wish for the court to award him any money, but he simply wants the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty. The court could accomplish the Plaintiff's desire * * * [by] *simply order[ing] the Defendants to reimburse to the plan amounts necessary so that Plaintiff's interest in the plan is what it should have been, but for the breach of fiduciary duty.* Such an order would be nothing more than a classic situation where the plan is being made whole.

BIO. App. 50a (emphasis added).[9]

On June 23, 2005, the district court granted respondents' motion for judgment on the pleadings. Pet. App. 15a-21a. On June 19, 2006, the Fourth Circuit affirmed. *Id.* at 1a-14a. In its opinion, the court of appeals summarized its resolution of the two questions presented as follows:

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[9] As petitioner made clear in this filing with the district court, restoration of losses to the plan unquestionably falls within the relief sought in his complaint. BIO App. 51a (noting the complaint's disjunctive reference to "'make whole' *or* other equitable relief pursuant to E.R.I.S.A." (emphasis added)); see also Pet. App. 4a (requesting "such other and further relief as the court deems just and proper").

> The plaintiff in this case alleges that defendant fiduciaries breached their duty to him by failing to implement the investment strategy he had selected for his employee retirement account. Relying on two separate provisions of * * * ERISA, 29 U.S.C. 1132(a)(2) and 1132(a)(3) (2000), he seeks recovery of the amount by which his account would have appreciated[10] had defendants followed his instructions. The district court concluded that his complaint did not request a form of relief available under ERISA, and it therefore granted defendants' motion for judgment on the pleadings.
>
> We affirm. Section 1132(a)(2) provides remedies only for entire plans, not for individuals. And while 1132(a)(3) does in some cases furnish individualized remedies, the Supreme Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 28 (1993) and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), compel the conclusion that it does not supply one here.

Pet. App. 2a.

Petitioner timely sought rehearing and rehearing *en banc*. The United States Department of Labor filed a brief *amicus curiae* in support. On August 8, 2006, the Fourth Circuit issued an order in which it rejected the arguments presented by the United States Department of Labor and denied the request for rehearing and rehearing *en banc*. Pet. App. 22a-29a. On June 18, 2007, this Court granted a writ of certiorari to resolve both of the legal questions decided by the court of appeals.

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[10] The claim that petitioner sought "the amount by which his account would have appreciated" is, although irrelevant, not a proper characterization of petitioner's complaint. BIO App. 3a-4a (alleging that "Plaintiff's interest in the plan has been *depleted*") (emphasis added).

SUMMARY OF ARGUMENT

At its core, this case presents one broad question. Can an individual whose 401(k) account balance is depleted by fiduciary misconduct recover the monetary losses under ERISA? The court of appeals answered this question in the negative. It was wrong. The recovery of such losses is available under both section 502(a)(2) and section 502(a)(3) of the statute.[11]

I. The interpretation of section 502(a)(2) of ERISA advanced by petitioner is a straightforward application of the relevant statutory text.

A. Sections 502(a)(2) and 409 of ERISA authorize a participant in a pension plan to sue a fiduciary to recover "*any* losses to the plan" resulting from each breach of "*any* of the * * * duties imposed upon fiduciaries" by the statute. 29 U.S.C. 1132(a)(2); 1109(a) (emphases added). In this case, petitioner has alleged that respondents, acting in a fiduciary capacity, failed to properly invest the assets allocated to his 401(k) plan account thereby causing it to diminish in value by approximately $150,000. Because the assets of a 401(k) plan are, by definition, allocated to the individual accounts of its participants, any losses to such a plan must *necessarily* result in a loss to one or more of the individual accounts within the plan. This does not change their character, however, as "losses to the plan." Section 502(a)(2) is a vehicle designed to permit individuals to restore such losses *first* to

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[11] Two briefs *amici curiae* filed with this Court present arguments as to why this Court's past interpretation of sections 502(a)(2) and 502(a)(3) may warrant reconsideration. See Pension Rights Center Amicus Br. in Supp. of Pet. as *Amicus Curiae* (arguing that this Court should reconsider its past interpretation of section 502(a)(2)); National Employment Lawyers' Assoc. Br. in Supp. of Pet. as *Amicus* Curiae (arguing that this Court should reconsider its past interpretation of section 502(a)(3)). Although there may be good reason to do so, no such reconsideration is required in order for petitioner to prevail in this case. The relief sought by petitioner is available under sections 502(a)(2) and 502(a)(3) of ERISA *as currently written and interpreted by this Court.*

the plan so that *then* the plan can allocate them to the affected participant(s)' individual plan account.

B. In rejecting petitioner's contention that he has sought to restore losses to the DeWolff Plan, the court of appeals relied on two untenable theories. First, the court reasoned that section 502(a)(2) of ERISA does not permit the recovery of losses that will only benefit a single participant in a 401(k) plan. Nowhere, however, does the text of ERISA require, suggest, or imply that a decline in the value of plan assets resulting from a fiduciary breach must affect more than one individual account holder to qualify as recoverable "plan losses." In fact, it says precisely the opposite. Second, the court of appeals reasoned that section 502(a)(2) does not permit the recovery of losses that result from the breach of a fiduciary duty owed solely to a single participant. The plain text of sections 502(a)(2) and 409, however, authorize a remedy for the breach of "*any* of the * * * duties imposed upon fiduciaries" by ERISA. And, in any event, the duties breached by respondents were owed to the entire DeWolff Plan.

C. Unable to provide a meaningful textual basis for its interpretation of sections 502(a)(2) and 409, the court of appeals instead purported to base its holding on language from this Court's opinion in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). Neither the holding of nor *dicta* in that case, however, provides any support for the Fourth Circuit's cramped interpretation of the statute. *Russell's* holding did not address what qualifies as "any losses the plan" under section 409 of ERISA because the plaintiff in that case expressly acknowledged that she was not seeking any relief on behalf of the plan. And, the *dicta* in *Russell* confirms that the restoration of funds sought by petitioner here falls squarely within the Court's conception of what relief is available under sections 502(a)(2) and 409 of the statute.

II. If this Court determines that petitioner is not authorized to seek the restoration of his 401(k) account losses

under section 502(a)(2) of ERISA, it should interpret the scope of "equitable relief" under section 502(a)(3) of the statute so as to authorize the relief that petitioner seeks. Such an interpretation of section 502(a)(3) is a faithful application of this Court's past holdings regarding the scope of relief encompassed by the phrase "equitable relief."

A. Section 502(a)(3) of ERISA authorizes a pension plan participant to seek "appropriate equitable relief" to redress violations of ERISA including the breach of fiduciary duty. 29 U.S.C. 1132(a)(3). The scope of the phrase "equitable relief" has been interpreted by this Court in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), and *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S.Ct. 1869 (2006). In this line of cases, the Court has established a two-part test to determine whether a plaintiff is seeking "equitable relief" under 502(a)(3). First, the basis for the plaintiff's claim must be equitable. Second, the remedy sought by the plaintiff must have been typically available in pre-merger courts of equity under the circumstances present in the case at bar.

B. The relief sought by petitioner in this case satisfies this Court's two-part test. Petitioner is seeking the restoration of specific monetary losses to his 401(k) account that were caused by respondents' breach of fiduciary duty. Such relief is perfectly analogous to the historical remedy of "surcharge" which was regularly awarded by pre-merger courts of equity as a remedy for breaches of trust in the precise circumstances present in this case. Although it may superficially appear to resemble compensatory damages, the remedy of surcharge is distinctly equitable in nature. It has a different purpose from legal damages; it has specific conditions that govern its application. And is no more "compensatory" than other remedies that this Court has already deemed to qualify as "equitable relief" under section 502(a)(3).

ARGUMENT

I. PETITIONER HAS REQUESTED RELIEF THAT IS AVAILABLE UNDER SECTION 502(A)(2) OF ERISA

In affirming the district court's grant of respondents' motion for judgment on the pleadings, the Fourth Circuit decided that petitioner failed to seek any relief that is available under ERISA. See generally Pet. App. 1a-14a. In so doing, the court of appeals explicitly rejected petitioner's contention that he was seeking to restore losses to the DeWolff Plan that were caused by respondents' alleged breach of fiduciary duty as authorized by sections 502(a)(2) and 409(a) of ERISA. *Id.* at 5a-7a, 24a-28a. As explained below, the Fourth Circuit erred.

A. Sections 502(a)(2) and 409 Authorize Petitioner to Seek Restoration of Plan Losses Regardless of Whether Such Losses Are Attributable to His Individual Account

Section 502(a)(2) of ERISA authorizes a participant in a pension plan to bring suit for "appropriate relief" under section 409 of the statute. 29 U.S.C. 1132(a)(2). Section 409(a), in turn, provides that

> any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan *any losses to the plan* resulting from each such breach.

29 U.S.C. 1109(a) (emphasis added).

There is no dispute in this case that petitioner has sought repayment to the DeWolff Plan of investment losses to his 401(k) plan account that were allegedly caused by respondents' fiduciary breach. See, *e.g.*, BIO App. 1a-5a, 50a. Nonetheless, the court of appeals held that petitioner was not seeking relief authorized by sections 502(a)(2) and 409(a) of ERISA because, in its view, the monies that petitioner sought to restore did not qualify as "losses *to the plan*." Pet. App. 24a ("To adopt the Secretary's view, however, would

necessarily transform every purely individual claim for breach of fiduciary duty into a 'plan loss.'"); *id.* at 27a (characterizing the government's "view of the term 'losses to the plan'" as "overly broad"). As explained below, the Fourth Circuit's conception of "plan losses" fundamentally misunderstands the nature of an individual account plan and, in so doing, disregards the plain text of ERISA.

1. Assets that are allocated to an individual 401(k) account remain plan assets

No one would seriously dispute that the term "any losses to the plan" includes any decrease in the total value of that plan's assets. In order to assess whether there has been a diminution in the total value of a particular plan's assets, however, it is first necessary to understand what comprises the assets of that plan. As noted above, this case involves a 401(k) plan—the most common type of what ERISA refers to as an individual account plan. See 29 U.S.C. 1002(34) (defining the term individual account plan). See also BIO App. 12a.

In any individual account plan, the plan's assets consist entirely of contributions to the plan as well as any interest or gains generated from such contributions. 29 U.S.C. 1002(34). By statutory design, all contributions made to an individual account plan must be allocated to one or more individual accounts within the plan that are set up for the benefit of each of the plan's participants. *Id.* "[C]ontributions are made to a single funding vehicle, usually a trust" and "as amounts are contributed to the trust, they are allocated to the participant's account." *See* David A. Littell et al., *Retirement Savings Plans: Design, Regulation, and Administration of Cash or Deferred Arrangement* 6 (1993).[12] "[T]he sum of all the account balances [allocated

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[12] The DeWolff Plan is no exception. Its summary plan description unambiguously states that "[a]ll money that is contributed to the Plan is held in a trust fund." BIO App. 42a. The document further provides that

to the various individual plan accounts] equals the total market value of the plan's assets." Dan M. McGill et al., *Fundamentals of Private Pensions* 247 (7th ed. 1996).

The "allocation" of plan assets to a participant's individual account within the plan, however, does not transfer the ownership of such assets from the plan to that participant. To the contrary, allocated assets are owned and controlled by the plan until the moment they are withdrawn from the plan by a participant or beneficiary.[13] Indeed, any alternative arrangement would cause a 401(k) plan to lose its tax preferred status under section 401 of the Internal Revenue Code. See Rev. Rul. 89-52, 1989-1 C.B. 110 ("While a qualified trust may permit a participant to elect how amounts attributable to the participant's account-balance will be invested, it may not allow the participant to have the right to acquire, hold and dispose of amounts attributable to the participant's account balance at will."). This ownership structure is not a mere formality, devoid of any real-world significance. To the contrary, the plan's control over the assets is an essential substantive feature of such plans. For example, a portion of the assets "allocated" to each individual account is customarily used to pay the costs necessary to operate the plan. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Field Assistance Bulletin 2003-3* (May 19, 2003)

"[t]he Trustee [*i.e.*, DeWolff] is responsible for the safekeeping of the trust fund" and that "[t]he trust fund * * * will be the funding medium used for the accumulation of assets from which benefits will be distributed." *Id.*

[13] Unlike a withdrawal from the plan, the "allocation" of plan assets to a participant's individual plan account does not involve a physical transfer *of any kind*. 1 Michael J. Canan, *Qualified Retirement Plans* § 3:5 (2007) (although "employer contribution[s are] credited to separate accounts for each employee, the trustee invests all of the funds in one certificate of deposit"). The "allocation" is nothing more than a bookkeeping entry used to keep track of each participant's ratable beneficial interest in the *plan's* assets.

<http://www.dol.gov/ebsa/regs/fab_2003-3.html> (discussing appropriate methods of allocating such expenses).

2. The diminution in a defined contribution plan's total assets may result from a loss to one 401(k) plan account

Because the assets of an individual account plan are, by definition, allocated to the accounts of its participants, any losses to such a plan must *necessarily* result in a loss to one or more of the individual accounts within the plan. In most cases, however, these plan losses will not impact every participant in the plan because the participants in an individual account plan have a beneficial interest in *particular* plan assets. See, *e.g.*, Rev. Rul. 02-45, 2004-1 C.B. 971 (noting, for tax purposes, that losses restored to a defined contribution plan must then be "allocated among the individual accounts of the participants and beneficiaries in proportion to each account's investment in [the asset that caused the loss]").

Whether, and how severely, any given participant in an individual account plan is affected by plan losses will depend upon which plan assets are depleted. Consider the following example: a pension plan fiduciary offers multiple investment options (*e.g.*, different mutual funds) to the participants in his plan. One of these mutual funds (Fund X) is nothing more than a personal bank account of the fiduciary that he uses to illegally divert pension funds for his own personal use. If any of the participants in this plan choose to invest in Fund X, the plan will suffer losses. If every participant in the plan invests in Fund X, then *every* participant will feel the effect of the plan's losses. If half of the participants in the plan invest in Fund X, then *half* of the participants will feel the effect of the plan's losses. And if only a single participant is unfortunate enough to invest in Fund X, then only that *one* participant will feel the effect of the plan's losses. Regardless of the number of participants affected, however, the plan will suffer losses in each of these examples because assets of the plan will have been depleted.

Petitioner's case is no different. He has alleged that respondents, acting in a fiduciary capacity, failed to invest the assets allocated to his plan account in accordance with his instructions and, as a result of that fiduciary breach, his plan account holds approximately $150,000 less than it would otherwise have held. In seeking restoration of these funds to the DeWolff Plan, petitioner has properly sought to restore "losses to the plan." 29 U.S.C. 1109(a). The fact that these plan losses, when recovered, will principally (or even exclusively) be allocated to petitioner's individual plan account is of no moment.[14] As one court of appeals recently observed, "ERISA entitles individual-account-plan participants not only to what *is* in their accounts, but also to what *should be* there given the terms of the plan and ERISA's fiduciary obligations." *Graden v. Conexant Sys. Inc.*, No. 06-2337, 2007 WL 2177170, at *3 (CA3 July 31, 2007). Section 502(a)(2) of the statute is the vehicle through which any losses may *first* be restored to the plan and *then* allocated to the affected participant's individual account.

B. The Fourth Circuit's Reading of 502(a)(2) and 409 Is Untenable

The Fourth Circuit admitted that "the recovery plaintiff seeks could be seen as accruing to the plan in [what it characterized as] the narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan." Pet. App. 6a (emphasis added). Nonetheless, the court of appeals concluded that petitioner was not seeking to recover "losses *to the plan*." The court advanced two untenable

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[14] Should petitioner ultimately prevail in this lawsuit and obtain a restoration of funds to the DeWolff Plan, respondents will undoubtedly be required under ERISA to allocate some—if not most—of these restored funds to the individual account of petitioner. See Law. Prof. Merits Br. in Supp. of Pet. as *Amici Curiae*, pt. I (explaining that ERISA's prudence requirement will obligate respondents to allocate some, if not most, of any restored funds in this case to the 401(k) plan account of petitioner once legitimate plan expenses have been deducted).

theories in support of its rejection of the plain meaning of the statute.

1. The Fourth Circuit's "individual benefit" theory is untenable

In the eyes of the Fourth Circuit, "[i]t is difficult to characterize the remedy plaintiff seeks as anything other than personal" because "[h]e desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit." Pet. App. 6a. Thus, the court of appeals concluded that petitioner has not sought to recover "losses *to the plan*" because "[t]he measure of [his desired] recovery is a loss suffered by him alone." *Id.* Such an interpretation of sections 502(a)(2) and 409 of ERISA is nothing more than a wholesale rejection of the plain meaning of the statute.[15]

Nowhere does the text of ERISA require, suggest, or imply that a decline in the value of plan assets flowing from fiduciary breach must affect more than one individual account holder to qualify as recoverable "plan losses." In fact, it says precisely the opposite: section 502(a)(2) authorizes recovery of "*any* losses to the plan," whether those losses are felt by one individual account, several individual accounts, or every individual account in the plan. As explained in Part I.A., *supra*, all are necessarily losses to the plan. In essence, the court of appeals decided that section 502(a)(2) requires a plaintiff to demonstrate *not only* (1) a loss to the plan *but also* (2) that the loss affected a class of plan participants, rather than just one plan participant. See Pet. App. 6a (contrasting the suit filed by petitioner with what the court considered to be a permissible "[section 502](a)(2) ac-

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[15] As explained in several briefs *amici curiae* filed with this Court, the Fourth Circuit's "individual benefit" theory also contravenes the very purpose behind sections 502(a)(2) and 409 of ERISA. See, *e.g.*, Self Ins. Inst. of Amer. Br. in Supp. of Pet. as *Amicus Curiae*, pt. II (arguing at length that the Fourth Circuit's rule will "fundamentally undermine ERISA").

tion in which an individual plaintiff sues on behalf of * * * a class of similarly situated participants").

Tellingly, the Fourth Circuit cited no text in ERISA that could possibly be read to prohibit suit by one plan participant yet authorize suit by a class of such participants. That is because no such language exists. Instead, the court of appeals, impermissibly wielding Congress's quill, simply rewrote section 502(a)(2) to authorize recovery for "any losses to the plan, but only if such losses affect some unspecified number of plan participants that is greater than one." This revision of ERISA's plain text eschews the designedly simple standard of "*any* losses to the *plan*" in favor of a nebulous, fact-based inquiry into whether "enough" plan *participants* were affected by the losses. Furthermore, such an approach leaves unanswered a host of practical questions: is a subclass of two participants enough? Is it the number (*e.g.*, more than ten) or percentage (*e.g.*, more than 50%) of participants affected that triggers a section 502(a)(2) claim? Is the amount or percentage of plan assets involved a relevant factor that a court may consider? If the Fourth Circuit is correct, then one must ask: how did Congress want courts to answer such questions and what guidance did it provide to do so?

ERISA itself gives Congress's answer. None of those questions matters. Not one line in the extensive and reticulated text of ERISA suggests that the meaning of "any losses to the plan" turns on how many plan participants were hurt or what percentage of assets were lost. Were such questions relevant, Congress would surely have supplied some guidance or standards. Yet it did not, choosing instead the simple expedient of unqualified text—"*any* losses to the plan." 29 U.S.C. 1109(a) (emphasis added).[16]

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[16] As noted by the United States, the expansive meaning of the word "any" is well recognized by this Court. See U.S. Merits Br. in Supp. of Pet. as *Amicus Curiae* 8 (citing *HUD v. Rucker*, 535 U.S. 125, 131 (2002)).

2. The Fourth Circuit's "individual duty" theory is untenable

The court of appeals also expressed its belief that the investment losses at issue in this case "allegedly arose as the result of defendants' failure to follow plaintiff's own particular instructions, thereby breaching a duty owed solely to him." Pet. App. 6a. This assertion of an "individual duty" is both irrelevant and inaccurate. It is irrelevant because, as the United States noted at the petition stage, "[s]ections 502(a)(2) and 409 provide a remedy for the breach of '*any* of the responsibilities, obligations, or duties imposed upon fiduciaries' by ERISA." U.S. Invitation Brief at 7 (citing 29 U.S.C. 1109(a) (emphasis in original). Put simply, there is nothing in the text of ERISA to suggest that only *certain* fiduciary breaches entitle a participant to seek restoration of plan losses pursuant to sections 502(a)(2) and 409.

It is also inaccurate because the obligation to follow the investment instructions of a participant is a fiduciary duty owed *to the plan.* See Law Prof. Merits Br. in Supp. of Pet. as *Amici Curiae*, pt. I.A. (explaining why "a breach of a fiduciary duty owed to an individual account holder may well constitute a breach of duty owed to the plan itself"). The Fourth Circuit's alternative view is fundamentally at odds with both the text and purpose of the statute. If the court of appeals' conception of "individual duty" properly reflected the fiduciary rules embodied in ERISA, then section 502(a)(2) would not permit the recovery of plan assets in a host of settings where such assets have unquestionably been depleted by fiduciary misconduct. For example, a fiduciary could (1) sell, exchange, or lease property *of the plan* in violation of 29 U.S.C. 1106(a)(1)(A) provided that this property has been allocated to only one participant; (2) lend money *of the plan* in violation of 29 U.S.C. 1106(a)(1)(B) provided that this money has been allocated to only one participant's account; or (3) transfer assets *of the plan* in violation of 29 U.S.C. 1106(a)(1)(D) provided that these assets have been allocated to only one participant's account. Similarly, a fidu-

ciary could violate his duties under section 404(a)(1)(B) of ERISA by providing negligent financial advice so long as it was only provided to one participant. See, *e.g.*, 29 C.F.R. 2509.96-1 (interpreting the definition of "fiduciary" in 29 U.S.C. 1002(21) to include someone who provides investment advice for a fee to any participant). And perhaps worst of all, a fiduciary could violate his duties under section 404(a)(1)(A) of ERISA by looting plan assets as long as the fiduciary restricts the theft to monies that have been allocated to a single participant in the plan. As these examples illustrate, the Fourth Circuit's conception of an "individual duty" cannot sensibly be reconciled with sections 502(a)(2) and 409 of the statute.

C. *Russell* Cannot Support the Fourth Circuit's Reading of 502(a)(2) and 409

Unable to provide a meaningful textual basis for its interpretation of sections 502(a)(2) and 409 of ERISA, the court of appeals instead purported to base its holding on language from this Court's opinion in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). As explained below, however, neither the holding of nor *dicta* in *Russell* provide any support for the Fourth Circuit's cramped interpretation of the statute.

1. *Russell's* holding did not address what qualifies as "any losses to the plan"

Russell involved an individual plaintiff, Doris Russell, who was a beneficiary of two ERISA welfare plans (collectively, "the plan"). *Russell*, 473 U.S. at 136. Ms. Russell became disabled and received plan benefits until a disability committee determined that she was no longer eligible. *Id.* After several months and further review, Ms. Russell's benefits were reinstated and she received full payment of all retroactive benefits to which she was entitled under the plan. *Id.* at 136-137. At this point, she filed a lawsuit in which she alleged, *inter alia*, that the delay in paying her

disability benefits was a fiduciary breach in violation of ERISA. *Id.* at 137.[17]

As a remedy for this alleged fiduciary breach, Ms. Russell sought monetary relief under sections 502(a)(2) and 409(a) of ERISA. *Id.* at 140. Unlike petitioner in this case, however, Ms. Russell did not seek to recover "any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a). Indeed, Ms. Russell explicitly acknowledged that she was not seeking any relief on behalf of the plan. See, *e.g., Russell*, 473 U.S. at 145-148. To the contrary, she sought pain and suffering as well as punitive damages payable directly to her as compensation for the delay in her receipt of disability benefit payments. *Id.* at 137-38. In support of this position, Ms. Russell argued that section 409 of ERISA obligates a breaching fiduciary to directly compensate a participant for individual injuries that occurred entirely outside of the plan. *Id.* at 139-148. See also Brief for the Respondent in *Massachusetts Mut. Life Ins. Co. v. Russell*, O.T. 1984, No. 84-9, 1984 WL 566097, *12-13 (hereinafter "*Russell* Resp. Br.") (arguing that "[p]articipants may recover damages on their own behalf for breaches of fiduciary duty under Section 1109" because [n]owhere in the language of Section 1109 or Section 1132 or the legislative history of ERISA is it specified that only the plan can recover under Section 1109").

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[17] It is significant that *Russell* involved a welfare plan. In the welfare plan context, fiduciary breach often does *not* involve the mismanagement or theft of plan assets. Instead, the typical allegation of fiduciary breach is brought by a participant or beneficiary (like Ms. Russell) who disputes the plan's refusal to pay certain plan benefits. In such situations, the resulting harm to a plan participant or beneficiary does not involve the loss of any plan assets. Section 502(a)(1) of ERISA was specifically enacted by Congress to permit the recovery of plan benefits by a participant or beneficiary. 29 U.S.C. 1132(a)(1). Ms. Russell did not proceed under 502(a)(1) only because she had already received all plan benefits to which she was entitled. *Russell*, 473 U.S. at 136.

Ms. Russell advanced two distinct arguments in support of her interpretation of section 409. Her primary argument was that the phrase "such other equitable or remedial relief as the court may deem appropriate" authorized individual relief because it does not specifically state that such relief must be obtained on behalf of the plan. *Russell*, 473 U.S. at 139-44.[18] In the words of her attorney:

> If you look at the language of Section 409, it doesn't say only the plan may collect against the fiduciary. Clause one says to the plan, clause two says to the plan, but when you get to clause three, which is the "such other equitable or remedial relief as the court deems appropriate," there is no qualifier, to the plan.

Transcript of (Second) Oral Argument in *Massachusetts Mut. Life Ins. Co. v. Russell*, O.T. 1984, No. 84-9 (Apr. 24, 1985), 1985 U.S. Trans Lexis 57. Alternatively, Ms. Russell argued that "a private right of action for participants and beneficiaries could be read into Section 1109." *Russell* Resp. Br., *supra*, at *14. See also *Russell*, 473 U.S. at 145.

This Court rejected both arguments. *Id.* at 148 ("Thus, the relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that in 409(a) Congress did not provide, and did not intend the judiciary to imply, a cause of action for extracontractual damages caused by improper or untimely processing of benefit claims."). Because the only issue presented in *Russell* was whether section 409 of ERISA authorized non-plan

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[18] As noted above, section 409(a) of ERISA imposes personal liability on a breaching fiduciary. The statutory text divides the categories of personal liability into three distinct clauses. The first clause mandates the restoration of any plan losses "*to such plan*." 29 U.S.C. 1109(a) (emphasis added). The second clause mandates the restoration of any profits "*to such plan*." *Id.* (emphasis added). The third clause is a discretionary provision that authorizes "such other equitable or remedial relief as the court may deem appropriate including removal of such fiduciary." *Id.*

relief, there was no occasion for this Court to address what qualifies as "any losses to the plan."[19] As such, the holding in *Russell* cannot resolve whether the relief sought by petitioner in this case satisfies section 409 and is, thus, available under section 502(a)(2).

2. *Russell's dicta* reinforces the plain meaning of "any losses to the plan"

Despite the fact that the holding of *Russell* did not address what constitutes "any losses to the plan" under section 409 of ERISA, the Fourth Circuit relied almost entirely on *dicta* from *Russell* to justify its rejection of the plain meaning of this statutory phrase. Pet. App. 5a, 6a, 24a. Of course, it is well settled that *dicta* is no substitute for a proper analysis of statutory text. See, *e.g.*, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as through they were the United States Code."). In any event, the language from *Russell* was taken out of context, and as such, does nothing to support the Fourth Circuit's cramped interpretation. Indeed, a proper reading of *Russell* only serves to reinforce the conclusion that petitioner's lawsuit is precisely the type of civil action that was contemplated by Congress in enacting sections 502(a)(2) and 409 of ERISA.

The *Russell* Court was interpreting the third clause in section 409 which authorizes "such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. 1109(a). It was in this context that *Russell* made the statements quoted by the court of appeals including phrases such as "plan as a whole" and "protect the entire plan." Because

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[19] As the opening sentence of the Court's opinion makes clear, the only question presented in *Russell* was whether "a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for extracontractual compensatory or punitive damages caused by improper or untimely processing of benefit claims." *Russell*, 473 U.S. at 136.

the third clause of section 409 is a catchall provision, it necessarily applies only if the relief sought by the plaintiff is not specifically authorized by one of the first two clauses. In other words, *Russell* required this Court to announce a standard for evaluating when a claim that does *not* seek "losses to the plan" or "profits of [a] fiduciary" *nonetheless* might constitute "appropriate" relief under section 409. It was in this context that this Court employed such phrases as "plan as a whole" and "protect the entire plan." As such, it is quite clear that *Russell* did not intend these phrases to *supplement* the meaning of the phrase "any losses to the plan" but rather to *describe* it. Put simply, the Court presumed—and correctly so—that the restoration of "*any* losses to the plan" (*i.e.*, the restoration of *any* diminution of plan assets) *necessarily* "inures to the benefit of the plan as a whole" and "protect[s] the entire plan."

Even a cursory examination of the complete opinion in *Russell* confirms that the restoration of funds sought by petitioner falls squarely within the Court's conception of what relief is available under sections 502(a)(2) and 409 of ERISA. The following examples are illustrative. In properly characterizing Ms. Russell's claim for pain and suffering damages as "individual," the Court noted that "the principal statutory duties imposed [by ERISA] on the trustees relate to the proper management, administration, and investment of fund assets." *Russell*, 473 U.S. at 142. These are the very statutory duties that petitioner alleges were violated by respondents in this case. In discussing the legislative history of section 409, the Court noted that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Id.* Such mismanagement of plan assets is the precise subject of this case. Even the language from *Russell* that was relied upon by the court of appeals focuses on the fact that that section 409 is "primarily concerned with the possible misuse of *plan assets*." As explained in Part I., *supra*, there can be no doubt that the

funds which petitioner is attempting to restore to the DeWolff Plan are just that: *plan assets*.

In sum, petitioner has properly sought the restoration of losses to the DeWolff Plan as authorized by sections 502(a)(2) and 409 of ERISA. The Fourth Circuit's contrary conclusion is based on a gross misinterpretation of both the plain text of the statute and this Court's decision in *Russell*. As such, reversal is warranted.

II. PETITIONER HAS REQUESTED RELIEF THAT IS AVAILABLE UNDER SECTION 502(A)(3) OF ERISA

If this Court determines that petitioner is not authorized to seek the restoration of investment losses under section 502(a)(2) of ERISA, it should interpret the scope of "equitable relief" in section 502(a)(3) of the statute so as to authorize the relief that petitioner seeks.[20] *Varity*, 516 U.S. at 513 ("It is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy."). As explained below, a lawsuit to recover monetary losses from a fiduciary whose breach has caused such losses seeks "equitable relief" under section 502(a)(3) as the term has been interpreted by this Court.

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[20] Section 502(a)(3) of ERISA "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [section] 502 does not elsewhere adequately remedy." *Varity*, 516 U.S. at 512. Even if petitioner *prevails* on the 502(a)(2) Question Presented, however, he respectfully requests that the Court adjudicate the 502(a)(3) Question Presented. It is unclear at this stage of the proceedings whether the ultimate scope of relief that will be available to petitioner is more extensive under section 502(a)(3) than under section 502(a)(2). Because petitioner believes that he has properly requested relief that satisfies *both* section 502(a)(2) and section 502(a)(3), he asks that this Court decide both questions presented so that that he can proceed under the latter section, if necessary, on remand.

A. Monetary Relief Is Available Under Section 502(a)(3) If It Was "Typically Available in Equity"

Section 502(a)(3) of ERISA authorizes participants and beneficiaries to bring a civil action to enjoin any act which violates ERISA or "to obtain other appropriate equitable relief" to enforce any provisions of the statute. 29 U.S.C. 1132(a)(3). For well over a decade, there has been continued judicial confusion over when a claim for monetary relief constitutes "equitable relief" under section 502(a)(3) of the statute. This Court first addressed the issue in 1993. See *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). In *Mertens*, the beneficiaries of an ERISA plan sought monetary compensation from a third party who allegedly participated in the plan fiduciaries' breach. Although "[m]oney damages are, of course, the classic form of *legal* relief," *id.* at 255, the beneficiaries—joined by the United States as *amicus curiae*—argued that they sought "equitable relief" under section 502(a)(3) because, "at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust." *Id.* (citations omitted). In other words:

> "[A]lthough a beneficiary's action to recover losses resulting from a breach of duty superficially resembles an action at law for damages," the Solicitor General suggest[ed that], "such relief traditionally has been obtained in courts of equity" and therefore, "is, by definition, 'equitable relief.'"

Id. (quoting Brief for United States as *Amicus Curiae* 13-14).

A deeply-divided Court rejected this argument. *Id.* at 257 ("Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all*.") (emphasis in original). Instead, the Court held that the phrase "equitable relief" was intended by Congress to limit the remedies available under section 502(a)(3) to "those categories of relief

that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S. at 256 (emphasis in original).[21]

In the years that followed, many ERISA plaintiffs attempted to seek monetary awards under section 502(a)(3) by characterizing the relief they sought as a remedy that would qualify as "typically available in equity" under *Mertens* (*e.g.*, restitution). A circuit split developed and, in 2002, this Court again addressed the circumstances under which monetary relief was available under section 502(a)(3). *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

In *Knudson*, the fiduciary of an ERISA welfare plan sought monetary reimbursement from a plan beneficiary of medical expenses that had been advanced on her behalf. Although the basis for this reimbursement claim was the plan contract itself, the fiduciary argued that it was not seeking the legal remedy of compensatory damages for breach of contract. Instead, the fiduciary maintained that its lawsuit was authorized by section 502(a)(3) because it sought to enforce its monetary reimbursement claim by requesting two categories of relief (injunction and restitution) that were explicitly identified in *Mertens* as "typically available in equity." *Id.* at 210-218. First, the Court affirmed the core holding of *Mertens* that "equitable relief" was intended by Congress to limit the remedies available under section 502(a)(3) to "those categories of relief that were typically available in equity." *Id.* at 209-210. Second, the Court's narrow majority went on to announce a standard by which lower courts could judge whether relief in a particular case would qualify as "typically available in equity." According to

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[21] It is now clear that the list of equitable remedies provided by the Court in *Mertens* was intended to be illustrative, not exhaustive. See, *e.g., Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006) (recognizing the remedy of equitable lien by contractual agreement as "typically available in equity").

the Court, the *Mertens* test is satisfied only if both (1) the basis for the plaintiff's claim is equitable, and (2) the remedy sought was typically available in pre-merger courts of equity under the circumstances present in the case at bar. *Id.* at 213.

The two-part test articulated in *Knudson* was recently reaffirmed by this Court in *Sereboff, supra.* In *Sereboff,* this Court held that a plan could enforce its contractual reimbursement provision under section 502(a)(3) by means of "an equitable lien established by agreement" against funds that had been received by a plan participant and beneficiary as part of a personal injury settlement. 126 S. Ct. at 1873-77. In ruling that the remedy sought was "equitable relief" under section 502(a)(3), the Court determined that both the basis for the plaintiff's claim and the precise remedy sought would have been considered equitable in the days of the divided bench. *Id.*

B. The Relief Sought by Petitioner Was "Typically Available in Equity" and Known as Surcharge

As explained above, a plaintiff seeks "equitable relief" under section 502(a)(3) of ERISA if (1) the basis of his claim is equitable and (2) the remedy he seeks was typically available in pre-merger courts of equity under the circumstances of the plaintiff's case. For the reasons that follow, the relief sought by petitioner here satisfies both prongs of this test.

1. The basis of petitioner's claim is equitable

This Court has made clear that a plaintiff seeking to avail himself of 502(a)(3) must first establish that "the basis for his claim is equitable." See *Sereboff,* 126 S. Ct. at 1874 (citing *Knudson,* 534 U.S. at 213). In *Sereboff,* this Court determined "the basis for [the plaintiff's] claim" by consulting its "case law from the days of the divided bench." *Id.* at 6. In concluding that "the basis for [the plaintiff's] claim" was equitable, this Court relied on "the familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he

gets a title to the thing." *Id.* at 6 (citing *Barnes v. Alexander*, 232 U.S. 117 (1914)). In essence, what *Sereboff* held is that "the basis for [the plaintiff's] claim" was equitable because the claim was viewed as such in pre-merger days. There can be no doubt that petitioner's breach of fiduciary duty claim in this case satisfies this standard. See, *e.g., Williams Electronics Games, Inc. v. Garrity*, 366 F.3d 569, 577 (CA7 2004) (noting that fiduciary obligations were an invention of the English chancery court").[22]

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[22] It is admittedly difficult to understand how the *Sereboff* inquiry into whether "the basis for [the plaintiff's] claim" is equitable is distinct from the inquiry into whether "the nature of the underlying remedies sought [by the plaintiff]" is equitable. *Cf. Knudson*, 534 U.S. at 224 (Ginsburg, J., dissenting) ("The Court purports to resolve this case by determining the 'nature of the relief' Great-West seeks. The opinion's analysis, h wever, trains on the question, deemed subsidiary, whether the disputed claim could have been brought in an equity court '[i]n the days of the divided bench.'") (citations omitted).

To be sure: one might suggest that *Sereboff* stands for the proposition that "the basis for [the plaintiff's] claim" was equitable because it was restitionary. Such a view, however, cannot be squared with the Court's actual holding. *Sereboff* did not authorize an equitable lien of the *restitutionary* variety. Rather, *Sereboff* authorized the plaintiff to proceed under section 502(a)(3) by seeking an equitable lien *by agreement*. As explained by the Sereboffs in their briefs filed with this Court, an equitable lien by agreement is a contractual remedy that is "equitable" only because it was awarded by a pre-merger court of equity when there was a technical impediment which prevented the plaintiff from proceeding in a suit at law. The remedy is *not* predicated on a showing of unjust enrichment. See Brief for the Petitioner in *Sereboff v. Mid Atl. Med. Servs., Inc.* at 24-25, O.T. 2005, No. 05-260, 2006 WL 165865 (discussing Dan B. Dobbs, *Law of Remedies* § 4.3(3), at 601 (2d ed. 1993)). This distinction was explicitly recognized by the *Sereboff* Court. *Sereboff*, 126 S. Ct. at 1875 (noting that "an equitable lien sought as a matter of restitution, and an equitable lien 'by agreement,' of the sort at issue in *Barnes*, were different species of relief.").

If *Sereboff* held that "the basis for [the plaintiff's] claim" was equitable because it was restitionary, however, then the Court necessarily *presumed* that the Sereboffs were unjustly enriched by the tort settlement they had received. The fact that the Sereboffs had received an "identifiable" sum of money (although relevant to the question of *remedy*) has

As in *Knudson* and *Sereboff*, the availability of section 502(a)(3) turns on whether the *remedy* sought (here, "surcharge") was typically available in pre-merger courts of equity under analogous circumstances to those of this case.

2. Pre-merger equity courts typically awarded surcharge under the circumstances of this case

The remedy of surcharge was typically awarded by pre-merger courts of equity. *Manhattan Bank v. Walker*, 130 U.S. 267, 271 (1889) ("The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for breach of trust."); *Princess Lida of Thurns & Taxis v. Thompson*, 305 U.S. 456, 458, 464 (1939) (describing authority of state court, in a "suit in equity," "to surcharge [a trustee] with losses incurred"); 4 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 1080, at 229 (5th ed. 1941); John Adams, Jun., *The Doctrine of Equity; Being a Commentary on the Law as Administered by the Court of Chancery* 93 (1850); 2 Joseph Story, *Commentaries on Equity Jurisprudence* §§ 1266-78, at 519-534 (12th ed. 1877); 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 199.3, at 206 (4th ed. 1987). Moreover, this case presents a paradigmatic example of a situation in which surcharge would have been awarded by a pre-merger court of equity—a case in which a fiduciary's purchase of improper investments has caused a loss. 2 Story, *supra*, §§ 1273-74, at 526-529; *Gates v. Plainfield Trust Co.*, 194 A. 65 (N.J. 1937) (*per curiam*).

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absolutely no bearing on whether the *basis* of the plaintiff's claim was restitionary. To be clear: the whole reason why an equitable lien *by agreement* was needed in the first place was so that the measure of recovery would be based on the parties' prior agreement and *not* on a consideration of equitable factors. Put another way, the monies in *Sereboff* "belonged in good conscience" to the plaintiff only because these funds were the subject of a prior agreement. The situation here is no different. There was a prior agreement that if DeWolff depleted specific funds by breaching a duty under ERISA, it would restore these funds to petitioner's account.

3. Surcharge is not properly viewed as a "legal remedy" that was awarded by equity courts in trust cases

In *Mertens*, this Court expressly rejected the argument that any remediation for breach of trust is *necessarily* "equitable relief" because such claims were exclusively adjudicated by equity courts in times of the divided bench. *Mertens*, 508 U.S. at 257. Of course, *Mertens* did not suggest that any particular remedy for breach of trust would not qualify as "equitable relief" for purposes of section 502(a)(3). Rather, it held that a remedy's exclusive availability in pre-merger equity courts did not *by itself* prove that such a remedy is properly viewed as "equitable relief" for purposes of ERISA. In explaining this point, the Court noted that "[a]t common law * * * there were many situations—not limited to those involving enforcement of a trust—in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." *Id.* at 256 (citing 1 Pomeroy, *supra*, § 181, at 257).

In light of this discussion in *Mertens*, it is necessary to analyze whether the surcharge of a breaching fiduciary for losses caused to a trust is one such example of the pre-merger equity courts "establish[ing] purely legal rights and grant[ing] legal remedies which would otherwise be beyond the scope of [their] authority." *Id.* In other words, is surcharge properly viewed as a legal remedy that happened to be awarded by pre-merger equity courts only because such courts had exclusive jurisdiction over all cases involving trusts? As explained below, the answer to this question is no.

The initial Restatement of Trusts, published in 1935, expressly identifies the remedies that were historically available to redress a breach of trust as either "legal" or "equitable." For example, section 198 of the Restatement is entitled, "Legal Remedies of the Beneficiary." Restatement (First) of Trusts § 198 (1935). This section explains that, "[i]f

the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment." *Id.* § 198(1). As the Restatement makes clear, this statement reflects the reality of pre-merger practice. See *id.* cmt. b ("At common law a person who held the legal title to money to which another person was beneficially entitled was liable to the other person in the common-law action of account. This form of action became generally obsolete and was superseded by a bill in equity and by the actions of debt and general assumpsit."). In other words, regardless of whether it was brought in a common law court of equity, a lawsuit by a beneficiary to collect monies wrongfully held by a trustee was one seeking "legal relief." And, this was true even if the beneficiary's legal theory for such a claim was denominated as "breach of trust." See *id.* § 198(2).

By contrast, section 199 of the Restatement is entitled, "Equitable Remedies of the Beneficiary." This section lists four equitable remedies available to a trust beneficiary: (1) "compel[ling] the trustee to perform his duties;" (2) "enjoin[ing] the trustee from committing a breach of trust;" (3) "compel[ling] the trustee to redress a breach of trust;" and (4) "appoint[ing] a receiver [to] administer the trust." *Id.* § 199. Respectively, these remedies can be described as (1) a mandatory injunction, (2) a prohibitory injunction, (3) surcharge, and (4) removal of the trustee. The precise contours of the third equitable remedy listed in this section (*i.e.*, "surcharge") are set forth in section 205 of the Restatement. See *id.* cmt. c ("If the trustee has committed a breach of trust, the beneficiary can maintain a suit to compel the trustee to redress the breach of trust (see § 205)."

Section 205 of the Restatement is entitled, "Liability in Cases of Breach of Trust." This section provides that a breaching trustee is "chargeable" with

> (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or

> (b) any profit made by him through the breach of trust; or
>
> (c) any profit which would have accrued to the trust estate if there had been no breach of trust.

Id. § 205. These remedies can all be grouped under the heading of surcharge. Although the remedy may superficially appear akin to compensatory damages, it is a distinctly equitable remedy that differs from legal damages in several important ways.

First, surcharge has what could be described as a distinctly restitionary, rather than compensatory, focus. For example, the measure of recovery was often pegged to the fiduciary's improper gains. See *id.* § 205(b). And even when it was measured by the beneficiary's loss, it was limited economic injury. In other words, it did not allow a plaintiff to recover any compensation for non-pecuniary losses directly resulting from the trustee's breach (*e.g.*, pain and suffering). See, *e.g.*, E. Daniel Robinson, Note, *Embracing Equity: A New Remedy for Wrongful Health Insurance Denials*, 90 Minn. L. Rev. 1447, 1469 (2006) ("Surcharge provides only compensation for financial loss [and] requires proof of a precise amount of loss. * * * In contrast, tort damages have a much larger scope—they often compensate for nonpecuniary losses.") (citations and footnotes omitted). Nor did it historically allow a plaintiff to recover nominal or exemplary damages. 3 Scott & Fratcher, *supra*, § 204, at 239; Dobbs, *supra*, § 3.11(1), at 315.

Second, surcharge functions as much as a sanction than as a form of compensation. *Mosser v. Darrow*, 341 U.S. 267, 268, 274 (1951) (in remanding for a determination of whether a "trustee who, although making no personal profit, permitted key employees to profit" from misconduct, should be liable for surcharge, this Court noted that "trusteeship is serious business" and "[t]he most effective *sanction* for good administration is personal liability for the consequences of forbidden acts") (emphasis added). For this reason, it is not surprising that surcharge is listed in section 199 of the Re-

statement right alongside the unquestionably equitable remedy of removing a trustee.[23] And for the same reason, although a beneficiary could seek to surcharge a "trustee with any loss that resulted from the breach of trust," 3 Scott & Fratcher, *supra*, § 205, at 237, a court was empowered to settle on an amount *less than* the full value of the loss to the trust. As noted by the Restatement in a section entitled, "Power of the court to excuse breaches of trust,"

> This is similar to the English Trustee Act, 1925, § 61, which provides that if it appears to the court that a trustee is personally liable for any breach of trust, "but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.

Restatement § 205 & cmt. g.[24] This type of flexibility is the touchstone of an equitable remedy. In the words of this Court, "[t]he essence of equity jurisdiction has been the power of the Chancellor to * * * mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

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[23] It is worth noting here that section 409 of ERISA, discussed at length in Part I, *supra*, specifically identifies "removal of [a] fiduciary" as one form of equitable relief. 29 U.S.C. 1109(a).

[24] The comment goes on to state that "In the absence of a statute it would seem that a court of equity may have power to excuse the trustee in whole or in part from liability where he has acted honestly and reasonably and ought fairly to be excused." Restatement § 205, cmt. g. This is perfectly consistent with Congress's use of the phrase "*appropriate* equitable relief" in sections 502(a)(3) and 502(a)(5).

4. The fact that surcharge may serve a compensatory function is irrelevant

Without conducting any of the historical analysis required by *Mertens*, *Knudson*, and *Sereboff*, most lower courts have summarily rejected the position of the United States that surcharge satisfies this Court's historical test for "equitable relief." Pet. 21. These courts, which include the Fourth Circuit below, have reached this conclusion largely because they have mistakenly read this Court's prior decisions as having already rejected the argument that surcharge is a form of "equitable relief."[25] In the words of one jurist,

> Despite the sweep of the language from the Restatement supporting actions in equity against fiduciaries for breach of their duties and the rarity of decisions requiring a jury for such claims, I am persuaded that the Supreme Court's dictum in [*Knudson*], sends a signal that should not be ignored. * * * The statement is dictum with respect to an action against a fiduciary because the defendant in [*Knudson*] was not a fiduciary. But the Court appears to be little concerned with the nature of the defendant and critically concerned with whether the defendant is being compelled to disgorge specific, traceable funds in his possession, in which case the action is in equity, or to pay money out of his pocket, i.e., damages, to a claimant.

Pereira v. Farace, 413 F.3d 330, 344, 346 (CA2 2005) (Newman, J., concurring), cert. denied, 126 S. Ct. 2286 (2006). In essence, these courts are reading this Court's precedent to suggest that surcharge is nothing more than legal relief that happened to be awarded by pre-merger equity courts in

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[25] As the United States explains at length, U.S. Merits Br. in Supp. of Pet. as *Amicus Curiae* 23-29, this Court has never held as such.

trust cases. These courts are wrong.[26] As explained above, surcharge is a unique remedy distinct from compensatory damages.

Once the purpose and conditions of the surcharge remedy are properly understood, it becomes clear that its "compensatory" character is no different than the "compensatory" character of other remedies that this court has already held to be "equitable." For example: the historical remedy of equitable restitution (enforced by means of a constructive trust or an equitable lien) entitled a plaintiff to recover an amount of money that was "unjustly" held by a defendant provided that certain technical conditions were met. This did not mean, however, that the monetary amount sought by the plaintiff did not *also* happen to compensate him for his loss. In fact, many cases of equitable restitution involve a requested disgorgement from the defendant of *the exact amount* that the plaintiff had lost. Despite this fact, this Court has held that restitution is "equitable relief" (*i.e.*, different from compensatory damages) as long as it can be obtained through a particular remedy that would have been awarded by a pre-merger court of equity under the factual circumstances alleged by the ERISA plaintiff.

So here, this Court should recognize that surcharge is an equitable remedy notwithstanding any compensatory purpose it may serve. To hold otherwise will, in the words of the United States, permit "[f]iduciaries [to] violate ERISA's stringent obligations, injure beneficiaries, and evade liability for the losses they caused." Brief of Sec'y of Labor as

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[26] If, however, this is a proper reading of *Mertens*, *Knudson*, and *Sereboff*, petitioner respectfully requests that this Court "revisit what [would then be a truly] unjust * * * ERISA regime," *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (CA3 2003) (Becker, J., concurring), and adopt the position advanced in one brief *amicus curiae* filed with this Court. See Nat. Employ. Lawyers' Assoc. Br. in Supp. of Pet. (arguing that *Mertens* should be overruled).

Amicus Curiae Supporting Appellant at 1, *Callery v. United States Life Ins. Co.*, 392 F.3d 401 (CA10 2004) (No. 05-1415), 2003 WL 24309395. As the United States cogently explains, such could not have been Congress's intent in enacting section 502(a)(3). See U.S. Merits Br. in Supp. of Pet. as *Amicus Curiae* 20-23.

CONCLUSION

For the reasons set forth above, the judgment of the Fourth Circuit should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

1. **29 U.S.C. 1002 provides in pertinent part:**

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program–

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the

benefits under the plan or the method of distributing benefits from the plan.

* * * * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 *et seq.*], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties im-

posed on such investment company, investment adviser, or principal underwriter by any other law.

* * * * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant–

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

* * * * *

2. 29 U.S.C. 1003 provides in pertinent part:

§ 1003. Coverage

(a) Except as provided in subsection (b) or (c) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

* * * * *

(c) If a pension plan allows an employee to elect to make voluntary employee contributions to accounts and annuities as provided in section 408(q) of Title 26 [26 U.S.C.A. § 408(q)], such accounts and annuities (and contributions thereto) shall not be treated as part of such plan (or as a separate pension plan) for purposes of any provision of this subchapter other than section 1103(c), 1104, or 1105 of this title (relating to exclusive benefit, and fiduciary and co-fiduciary responsibilities) and part 5 (relating to administration and enforcement). Such provisions shall apply to such accounts and annuities in a manner similar to their application to a simplified employee pension under section 408(k) of Title 26.

3. **29 U.S.C. 1104 provides in pertinent part:**

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and–

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * * * *

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information

comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

* * * * *

4. 29 U.S.C. 1109 provides:

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

5. 29 U.S.C. 1132(a) provides in pertinent part:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * * *

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

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